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In The

Supreme Court of the United States

SPECTOR GADON & ROSEN, P.C.
and ALAN B. EPSTEIN, ESQUIRE,

Petitioners,

V.

NANCY KANTER, ESQUIRE,

Respondent.

On Petition For Writ Of Certiorari
To The Superior Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a civil defendant deprived of due process by arbitrary and capricious judicial action including a trial court's *sua sponte* award of substantial punitive damages to a plaintiff despite a jury verdict in favor of defendants on punitive damages, and the denial of appellate review by *sua sponte* application of a newly announced rule, contrary to all existing precedent, that a party raising too many claims of error waives all claims on appeal?

PARTIES TO THE PROCEEDING BELOW

Pursuant to Rule 14.1(b) and Rule 29.6, the following list identifies all of the parties before the Superior Court of Pennsylvania.

Petitioner, Spector Gadon & Rosen, P.C., appellant below, is a law firm operated as a professional corporation which petitioned for and received an award of attorneys' fees under 42 U.S.C. § 1988 in a civil right action in the United States District Court for the Eastern District of Pennsylvania. Spector Gadon & Rosen, P.C. has no parent corporation and no publicly traded company owns any stock in the firm.

Petitioner, Alan B. Epstein, Esquire, appellant below, is an attorney at law, licensed to practice in the Commonwealth of Pennsylvania, who successfully litigated a civil rights action to settlement on behalf of a minor, Tara M., acting by and through the minor's guardian, in the United States District Court for the Eastern District of Pennsylvania. Mr. Epstein undertook representation while a partner at the law firm of Jablon Epstein & Wolf; however, at the time of settlement, Mr. Epstein was employed by Spector Gadon & Rosen, P.C.

Respondent, Nancy Kanter, appellee below, is an attorney at law, licensed to practice in the Commonwealth of Pennsylvania. Ms. Kanter was the court-appointed guardian for a minor, Tara M., and in her capacity as guardian retained Jablon Epstein & Wolf to represent the minor in the aforementioned civil rights action. Ms. Kanter was named as the plaintiff in the civil rights litigation in her capacity as guardian, and she was also added as a third party defendant in the action. After settlement, Ms. Kanter demanded a

PARTIES TO THE PROCEEDINGS BELOW - Continued

referral fee of one-third of the fees awarded by the district court. When Mr. Epstein and Spector Gadon & Rosen, P.C. objected to payment of any referral fee, Ms. Kanter sued them for breach of contract and conversion.

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**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA**

Spector Gadon & Rosen, P.C. and Alan B. Epstein, Esquire, respectfully petition for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania in this case.

OPINIONS BELOW

The decision of the Superior Court of Pennsylvania, reported at 866 A.2d 394 (Pa.Super. 2004), is reprinted at App. 1. The Superior Court's unreported order denying petitioners' requests for reconsideration and/or reargument is reprinted at App. 17. The unreported order of the Supreme Court of Pennsylvania, denying petitioners' petitions for allowance of appeal, is reprinted at App. 96. The decision of the Court of Common Pleas of Philadelphia County, Pennsylvania, reported at 66 D. & C. 4th 353 (Phila. Cty. 2004), is reprinted at App. 19.

JURISDICTION

The judgment of the Superior Court of Pennsylvania issued on December 10, 2004. The Superior Court denied reconsideration and/or reargument of the judgment on February 11, 2005. The Supreme Court of Pennsylvania denied discretionary review of the judgment of the Superior Court by its Order of August 2, 2005, denying petitioners' petitions for allowance of appeal. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the due process clause of the Fourteenth Amendment to the United States Constitution, which states: "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV.

STATEMENT OF THE CASE

Background.

In January, 1991, the Philadelphia Court of Common Pleas appointed respondent, Nancy Kanter, as the "child advocate" for a minor, "Tara M.," whom the City of Philadelphia had placed in foster care. The child was physically abused and tortured by her City-selected foster parents who were criminally prosecuted. Respondent was appointed as guardian for Tara M. and met with petitioner Alan B. Epstein, Esquire to discuss retaining his firm, Jablon, Epstein, Drucker & Wolf, to represent Tara M. in a civil rights action against the City. App. 1-2. The Jablon Firm accepted the case, and respondent, in her capacity as Tara M.'s guardian, executed a written fee agreement under which the Jablon Firm would receive a contingency fee from any recovery on behalf of the minor. No provision was made for a referral fee to respondent. *Id.*

The Jablon firm subsequently brought a federal court action on Tara M.'s behalf against the City, in which respondent, in her fiduciary capacity as Tara M.'s guardian, was the named plaintiff. The City subsequently joined respondent as a third-party defendant. App. 68.

After the Jablon firm was disbanded and petitioner Epstein joined petitioner Spector Gadon & Rosen, P.C., the City settled the Tara M. suit for \$4.3 million, \$10,000 of which was contributed by respondent's malpractice insurer. Upon petition, the district court awarded the Spector Firm a \$1.29 million fee. App. 2, 69.

Despite the absence of any reference to a referral fee in the written fee agreement and despite respondent's retention of counsel in her capacity as a fiduciary to Tara M., at the time of the successful settlement of the civil rights action, respondent claimed that petitioner Epstein had orally promised her one-third of his firm's fee. Petitioner Epstein denied making any such promise. Respondent demanded that petitioners pay her a \$431,000 referral fee. Her demand was rejected by petitioners, and respondent sued petitioners in the Court of Common Pleas of Philadelphia County for breach of oral contract and conversion. App. 2, 69.

Proceedings below.

After a trial before a judge and jury, the jury found for respondent on her claims for conversion and breach of contract and awarded compensatory damages of \$215,500. App. 2. Because of the jury's verdict on respondent's tort-based conversion claim, the issue of punitive damages was tried to the jury. The jury returned a verdict finding neither petitioner liable for punitive damages. App. 2, 19-20.

Post-trial, the trial court not only ordered an additur doubling the jury's award of compensatory damages, and added pre- and post-judgment interest, but also *sua sponte* granted respondent extraordinary and unprecedented relief in the form of an option of a new trial on punitive damages or accepting an award of punitive damages in the

amount of \$645,000. Respondent opted to receive the award of punitive damages without being required to undergo a new jury trial on the issue. In addition, the trial court added \$124,219.86 in attorneys' fees, and \$87,000 in accrued fines for contempt, all arising from petitioners' purported failure to "comply with the Court's orders relating to punitive damages." App. 26-27. In total, the trial court increased the jury's verdict from \$215,500 to a total judgment of almost \$1.3 million. Petitioners appealed to the Pennsylvania Superior Court.

The trial court ordered petitioners to submit statements of issues complained of on appeal in accordance with Pennsylvania Rule of Appellate Procedure 1925(b).¹ Recognizing the rule in Pennsylvania that any issue not raised in a Rule 1925(b) statement is waived on appeal, and in view of the complex and convoluted history of the post-trial proceedings, each petitioner filed comprehensive statements of the issues on appeal, wholly consistent with Rule 1925(b). Petitioners' 1925(b) statements in their entirety, including their claim of a denial of due process by reason of the trial court's *sua sponte* imposition of punitive damages after the jury's verdict for petitioners on that issue, are set forth in the trial court's Opinion. App. 33-62. *See specifically* App. 33-35, 48-50.

Eight months after having received petitioners' Rule 1925(b) statements, the trial court issued an 85-page Opinion addressing fully the issues raised by petitioners.

¹ Pa.R.A.P. 1925(b) provides: "The lower court forthwith may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of matters complained of on appeal no later than 14 days after entry of such order. A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of."